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Supreme Court, U.S.
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No. 97-1325

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PALADIN ENTERPRISES, INC.
Petitioner,
v.
VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE HORROR WRITERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE HORROR WRITERS ASSOCIATION AND ITS INTEREST AS AMICUS CURIAE

The Horror Writers Association ("HWA") is a not-for-profit organization whose members are writers, editors, illustrators, filmmakers, publishers, scholars and students of the literature of horror and the supernatural. Its membership constitutes a "who's who" of contemporary entertainment and scholarship, including, among many others, Clive Barker, Janet Berliner (current president), Ramsey Campbell, John Carpenter, Ellen Datlow, Stephen King, Brian Lumley (immediate past president), Richard Matheson, David Morrell, Joyce Carol Oates, Peter Straub (member, Board of Trustees), Lawrence Watt-Evans and Jane Yolen. HWA, like Mystery Writers of America and Science Fiction Writers of America, provides a network of assistance and support for its diverse, primarily self-employed membership, offering instructional programs, alternative dispute resolution, insurance coverage and a hardship fund; it also administers the annual Bram Stoker Awards for achievement in the field.

The HWA participates here as amicus curiae because the decision of the Court of Appeals threatens the fragile protections of the First Amendment and endangers the artistic freedom that is a firmament of our society. [1/]

[1/] Pursuant to Supreme Court Rule 37.2(a), written consent of counsel for petitioner and respondents has been obtained and has been filed concurrently with this brief. Counsel for no party authored this brief, in whole or in part, and only HWA and its counsel have made a monetary contribution to the preparation and submission of this brief. See Supreme Court Rule 37.6.

The HWA has unique concerns about the freedom of expression. The literature of horror is a transgressive artform whose insistent confrontation of death is often misunderstood and criticized. Although horror fiction is easily compromised by lurid imagery and sensationalism, the conscientious proponents of this literature, represented here by HWA, provide an essential political, social and metaphysical discourse that is in fact our most enduring artform.[2/]

Thus, although Horace Walpole's The Castle of Otranto (1764) sparked the Gothic flame, and playwright John Webster created the first horror stories written in English, The White Devil (1612) and The Duchess of Malfi (1623), they were newcomers to the form. What some call the earliest "novel" of western civilization, Metamorphoses by Lucius Apuleius (circa 170 AD), is a fantasy about a man tormented by witchcraft. A ghost haunts Pliny's Epistles (100 AD); a werewolf stalks the Satyricon of Petronius (60 AD); and horrific elements animate the Aeneid (circa 20 BC), the Iliad and Odyssey (circa 700 BC), and the foundation of all western literature, the Sumerian epic poem Gilgamesh (circa 2000 BC). Before the written word, the

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[2/] See, e.g., Leslie A. Fiedler, Love and Death in the American Novel, New York: Dell, rev. ed. 1966; Edward J. Ingrebretsen, S.J., Maps of Heaven, Maps of Hell, Armonk, NY: Sharpe, 1996; James Twitchell, Dreadful Pleasures: An Anatomy of Modern Horror, New York: Oxford University Press, 1985; Douglas E. Winter, Stephen King: The Art of Darkness, New York: New American Library, 1984, rev. ed. 1986.

tale of horror flourished in cave paintings, in religion and ritual, and in stories told by firelight as our distant ancestors huddled together against the night and its creatures, real and imagined.

"The oldest and strongest emotion of mankind is fear," wrote H. P. Lovecraft, an early twentieth-century master of horror fiction. Not surprisingly, the first truly American novel -- Wieland, or The Transformation (1798) by Charles Brockden Brown, a Philadelphia attorney of Quaker stock -- was a horror novel. Edgar Allan Poe fathered the modern short story and the murder mystery: "The Murders in the Rue Morgue" (1841) introduced the world's first fictional detective, C. Auguste Dupin, and, in the words of Dorothy L. Sayers, "constitutes in itself almost a complete manual of detective theory." From the Universal Studios classics of the 1930s to the motion pictures of Alfred Hitchcock (including the legendary Psycho, based on the novel by late HWA member Robert Bloch), films of supernatural and psychological terror have been a staple of our entertainment. One of the most memorable, and socially relevant, television programs of the 1960s was Rod Serling's "The Twilight Zone." Today, HWA member Stephen King is the bestselling writer of our time. The importance of expressions of horror in past and present discourse – and thus, to freedom of speech – is profound, and the issues presented by this petition must be considered in that context.

STATEMENT OF THE CASE

The petition seeks review of a unique and troubling decision, reported at 128 F.3d 233 (4th Cir. 1997), which holds, for the first time in American history, that the publisher of a book may be liable in tort for the criminal acts of one of the book's readers.

The essential facts are set forth in the Petition of Paladin Enterprises. The Court of Appeals believed that Paladin's stipulation to the Joint Statement of Facts was "extraordinary." Pet. App. 17a, 33a-46a.[3/] But Paladin stipulated to facts known by all contemporary writers and publishers. "Copycat" crimes occur. Information is used and abused by the disturbed, disaffected and dangerous elements of our society. As Paladin stipulated, publishers and writers of mass-marketed works thus know that their texts may and will be used by criminals and would-be criminals to plan and execute crimes. J.A. 58-62.

[3/] References to the Appendix to the Petition for Writ of Certiorari are denoted by the abbreviation "Pet. App." References to the Joint Appendix in the Court of Appeals are denoted by the abbreviation "J.A."

SUMMARY OF ARGUMENT

A writ of certiorari should be granted in order to remedy a conflict with this Court's landmark decision in Brandenburg v. Ohio and to prevent the chilling specter of tort litigation against writers and publishers of mass-marketed works that others allegedly consult or use for criminal purposes.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW VITIATES FIRST AMENDMENT PROTECTION OF WORKS MARKETED TO A MASS AUDIENCE

In holding for the first time in American history that a publisher may be subject to tort liability for a murder committed by a reader of a book, the Court of Appeals strikes at the very heart of the First Amendment: the ability of a free press to express ideas, however unpopular, without intimidation or threat of interference by the state. The decision to deem Hit Man – and, thus, other mass-marketed expressions of the techniques of crime – unprotected speech sanctions the chilling and silencing of writers and publishers through tort litigation by anyone and everyone who thinks that they have been injured by words that were once read by a criminal. This Court should fulfill the "constitutional responsibility" of the judiciary to assure that the maintenance of litigation directed at the content of speech "does not constitute a forbidden intrusion on the field of free expression." Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 501, 508 (1984).

The First Amendment prohibits the imposition of civil liability on the publisher of a book marketed to a general audience unless its text falls within one of the few well-defined and narrowly limited classes of "unprotected speech." The only class of "unprotected speech" potentially applicable to Hit Man is that described in Brandenburg v. Ohio, 395 U.S. 444 (1969), which requires fulfillment of the heavy burden that speech is (1) "directed to inciting or producing imminent lawless action" and (2) "likely to incite or produce such action." Id. at 447.

That burden was not fulfilled: The tragic murders occurred ten years after Hit Man was first published, and fourteen months after the killer purchased the book. J.A. 59, ¶ 2; 61, ¶¶ 6,8. Paladin, like the maker of the AR-7 rifle used to commit the murders, may have known that a criminal could use what was placed in his hands to commit a heinous crime; but it is undisputed that Paladin had no knowledge of the planned killings or the role its book could play in them. J.A. 59, ¶ 3. It is also undisputed that the book contained no information that was not previously available to the public. J.A. 67-93, ¶¶ 13-32.

However, the Court of Appeals erased any requirement of "imminence," limiting Brandenburg's holding to instances of "abstract advocacy." Pet. App. 63a-67a. The Court of Appeals thus invented a new class of "unprotected speech" applicable when a book or other form of speech could be said to constitute the "aiding and abetting" of a crime. Pet. App. 26a-28a.

This unprecedented construct ignores the right of a free press to describe crime and the methods of committing crime – a right exercised with regularity in our news and entertainment, as well as political and social commentary, e.g., Truman Capote's In Cold Blood (1966).

The danger posed by the Fourth Circuit's decision is exemplified by consideration of The Killing Spirit: An Anthology of Assassins, New York: Overlook Press, 1996. Edited by Jay Hopler, this book collects Anglo-American literature about the "Hit Man," and offers, in its editor's words, "an accurate and compelling literary representation of the assassin . . ." (p. 3). Those "accurate and compelling" accounts are written by such literary giants as Ernest Hemingway ("The Killers," 1927); Graham Greene (an excerpt from This Gun for Hire, 1936); Damon Runyon ("Gentlemen, the King!" from Guys and Dolls, 1956); Joyce Carol Oates ("The Death of Mrs. Sheer," 1964); and Patricia Highsmith (an excerpt from Ripley's Game, 1993).

Like Hit Man, The Killing Spirit is what the Fourth Circuit calls "pure and simple, a step-by-step murder manual," Pet. App. 62a, setting forth detailed descriptions of murder for hire and its methodology. That Hit Man is presented as purported nonfiction is a meaningless distinction: accurate fiction conveys the same information with equally convincing, if not more persuasive, force.

Thus, Hit Man is indistinguishable from a myriad of other texts now in the marketplace. Like other nonfiction titles, Hit Man is a research tool that offers verisimilitude and authenticity to writers of fiction as well as intelligence to law enforcement and security officials. It is also entertainment. Even a brief glance at the shelves of our

libraries and bookstores shows that Americans enjoy reading about murder. "True crime" selections offer vivid nonfiction accounts of homicide and its techniques. Mystery and detective stories, espionage novels and thrillers – as well as horror fiction – focus insistently on murder and its methods.

Seen in this context, Hit Man is a prime example of postmodern "infotainment," fact and fantasy wrapped together with all the alarum of tabloid television: sensational, sordid, self-indulgent and self-mocking. It is, in other words, precisely the kind of unpopular speech that the First Amendment was intended to protect.

The Court of Appeals' decision to condemn Hit Man as a "murder manual" and, thus, unworthy of the First Amendment hinges entirely on a finding that is contrary to the undisputed (and, indeed, stipulated) facts: "If there is a publication that could be found to have no other use than to facilitate unlawful conduct, then this would be it, so devoid is the book of any political, social, entertainment, or other legitimate discourse." Pet. App. 45a.

The finding is patently erroneous, given publications like The Killing Spirit and the parties' Joint Statement of Facts, which provides in paragraph 5 that:

> a. [D]efendants' marketing strategy was and is intended to maximize sales of its publications to the public, including sales to (i) authors who desire information for the purpose of writing books about crime and criminals, (ii) law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, (iii) persons who enjoy

reading accounts of crimes and the means of committing them for purposes of entertainment, (iv) persons who fantasize about committing crimes but do not thereafter commit them, and (v) criminologists and others who study criminal methods and mentality.

b. [I]n publishing, marketing, advertising and distributing Hit Man and Silencers, as well as other publications, defendants intended and had knowledge that their publications would be purchased by members of the general public, including those persons and for those purposes listed in ¶ 5(a). J.A. 60, ¶5.

The parties also stipulated that approximately 13,000 copies of Hit Man have been sold nationally. J.A. 61, ¶ 8. This sales figure exceeds that for a typical first novel sold in hardcover or trade paperback in the United States and, indeed, it is above average for general nonfiction titles sold in hardcover or trade paperback.

Moreover, the declarations submitted by Paladin – which were not disputed – confirm that Hit Man was published to, and read by, a mass audience of diverse interests, including the legitimate interests identified in paragraph 5 of the Joint Statement of Facts. J.A. 67-111.

Despite this factual record, the Court of Appeals ruled that "the audience both targeted and actually reached is, in actuality, very narrowly confined," Pet. App. 30a; and that a jury could "reasonably conclude that Paladin essentially distributed Hit Man only to murderers and would-be murderers" and that its "only genuine use is the unlawful one

of facilitating such murders." Pet. App. 43a-45a. The Court of Appeals thus effectively rewrote Hit Man and its sales history in order to eliminate the protections of the First Amendment.

It is particularly disturbing that the Court of Appeals should have ostracized Hit Man on the (mistaken) belief that the book is sold primarily by mail order. Pet. App. 44a. It is just such texts, written or published by minorities, the dispossessed and others who have no access to traditional avenues of mass market distribution (including many of HWA's members) that the First Amendment was intended to protect.

A court cannot "demonize" speech that the record plainly shows has legitimate value to Americans. For better or worse, murder is a significant element of contemporary American discourse – from ongoing debate about gun control, capital punishment, political assassination, domestic violence, self-defense and celebrity crimes to our daily news and entertainment. A book that details the modus operandi of a hired killer, whether factually or as fantasia, contributes to that discourse.

Whether Hit Man is moral, likable, tasteful, entertaining or enlightening is beside the point. The truest measure of our democratic ideal is our willingness to tolerate the most offensive and sordid expressions. "[T]he benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988). Indeed, writing that shocks or offends its readers may, as in the case of Thomas Paine or Jonathan Swift, prove

that which most effectively encourages moral thought. Texas v. Johnson, 491 U.S. 397, 408-09 (1989). For these reasons, the Court of Appeals clearly erred in excising Hit Man from the protections of the First Amendment.

II. THE DECISION BELOW EXPOSES WRITERS AND PUBLISHERS TO THE CHILLING SPECTER OF UNWARRANTED LITIGATION

The open-ended nature of the decision below is also disturbing, and a clear invitation to further lawsuits against writers and publishers. In suggesting that its result was limited in scope, the Court of Appeals repeatedly, and without explication, noted the likelihood of exceptions that might justify suit. Pet. App. 67a-71a. Thus, it wrote that there would "almost never" be evidence supporting its outcome; that "virtually" every "copycat" case would be exempt from its holding; and that inferring unlawful motive would not be reasonable "for almost any" book or movie. Pet. App. 68a-69a. These undefined but apparent exceptions expose every creative enterprise to the whims of inventive lawyers and the chilling threat of unwarranted tort litigation.

The existence of, and publicity about, "copycat" crimes have placed publishers and writers on notice that depictions of crime and violent conduct can and will be acted upon by others. When those depictions are published, then, as Paladin Press has conceded here, there is arguably (if not necessarily) an intent that the depictions may be acted upon. As a result, any work published for a legitimate end is also published with the knowledge – and thus, arguably, the intent – that it may be used for an illegitimate end. This knowledge could create an issue of fact concerning a writer's

or publisher's intent, thus preventing summary disposition of the most frivolous claims.

By supplanting the objective standards of Brandenburg and placing a writer's or publisher's intent at issue, the Court of Appeals opens the floodgates of litigation against any work claimed to have been consulted or used in a crime, and thus chills historically legitimate expressions of crime and criminal behavior in fictional and nonfictional forms. Writers and publishers would be exposed to liability "on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

The decision below thus eliminates longstanding certainty in the law governing freedom of expression and creates a dangerous precedent. The landmark decision in Brandenburg should be vindicated and the decision below reversed, thus restoring certainty to the protections of the First Amendment.

CONCLUSION

For these reasons, the Horror Writers Association respectfully requests that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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